SUPREME COURT, U. S.

FILED

JAN 17 1974

MICHAEL RODAK, JR., CLERK

No. 73-624

In the Supreme Court of the United States

OCTOBER TERM, 1973

PETER N. LAZAROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	16

CITATIONS

Cases:

Branzburg v. *Hayes*, 408 U.S. 665 ..... 6, 7, 9, 10
Brown v. *United States*, 245 F. 2d 549 10
Gebhard v. *United States*, 422 F. 2d 281 15
Richards v. *United States*, 408 F. 2d 88,4 certiorari denied, 395 U.S. 986 15
Richardson v. *United States*, 273 F. 2d 144 12
Sherman v. *United States*, 356 U.S. 369 14
United States v. *Calandra*, No. 72–734, decided January 8, 1974 7
United States v. *Cross*, 170 F. Supp. 303 ..... 9, 10
United States v. *Dionisio*, 410 U.S. 1 7
United States v. *George*, 444 F. 2d 310 8
United States v. *Icardi*, 140 F. Supp. 383 ..... 9, 10
United States v. *Mara*, 410 U.S. 19 7
United States v. *Stone*, 429 F. 2d 138 ..... 7, 8
United States v. *Sweig*, 441 F. 2d 114, certiorari denied, 403 U.S. 932 8
United States v. *Tyrone*, 451 F. 2d 16 15
United States v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955 7

Statutes:

18 U.S.C. 1001 14
18 U.S.C. 2514 ..... 4, 12
18 U.S.C. 6001 12

530-235—74——1

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 480 F. 2d 174.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1973. A petition for rehearing was denied on September 10, 1973. The petition for a writ of certiorari was filed on October 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted of testifying falsely before the grand jury on August 21, 1969, concerning accusations that he had bribed or observed the bribery of public officials.

STATEMENT

A twelve-count indictment returned in the United States District Court for the Eastern District of Michigan on August 26, 1969, charged petitioner with having committed perjury before a grand jury which was conducting an investigation to determine whether public officials had been bribed (A. 2–13).[1] After a jury trial, petitioner was convicted on all counts and was sentenced to twelve consecutive terms of imprisonment for a year and a day (A. 22–23). The court of appeals vacated the convictions and sentences on three counts, and affirmed the remainder (Pet. App. B).

The evidence established that in November 1968 petitioner, who was at the time under investigation by the Audit and Intelligence Division of the Internal Revenue Service and had been formally charged in an Oakland County, Michigan, state court with having obtained money under false pretenses (A. 105, 122–123, 137, 181),[2] accused certain IRS and local officials

[1] "A." designates references to petitioner's appendix filed in the court below, a copy of which is being lodged with the Clerk of this Court.

[2] During the subsequent investigations, petitioner repeatedly asked that these charges be dismissed in exchange for his cooperation (A. 123–124, 169, 182).

of crimes and improprieties relating to their official duties. Between November 1968 and April 3, 1969, petitioner gave IRS inspector DeBoer and his superior detailed information concerning bribes allegedly given to IRS agents. (A. 35–37, 40–41, 46, 48, 57, 107–116, 118).[3] Additionally, he implicated in bribery transactions Detroit Mayor Cavanaugh, Detroit Purchasing Agent Stone, and Detroit Police Inspector Dunleavy (A. 36, 39, 44, 54–57, 62).

Petitioner's allegations, which he also released to the news media, led to extensive state and federal investigations. The grand jury began its investigation on June 12, 1969. On that day, petitioner appeared at the federal building but left without testifying, stating that he had to return home because his wife was ill (A. 75, 149, 156). On June 26, 1969, petitioner appeared before the grand jury pursuant to subpoena and declined to answer any questions, asserting his privilege against self-incrimination (A. 80–81). Between June 26, 1969, and August 21, 1969, when he

[3] For example, on December 18, 1968, petitioner told DeBoer that IRS employees Lee, Gardner, McDonald, and Harris were "connections for the outfit" (A. 107–109). On February 12, 1969, after looking at pictures of IRS employees, petitioner selected a picture of IRS Agent Getto as being "the tip-off man for the outfit." On February 25, 1969, petitioner informed DeBoer that he had seen an IRS employee, known to him as "J. Brown" (subseqently identified by petitioner from a photograph as IRS Agent Conrad), take a bribe in 1964. (A. 54–56, 113–114). On February 27, 1969, appellant, in the presence of his brother and an FBI agent, described to DeBoer an instance when IRS Agent Lockwood received $3,000 upon removing a file from the federal building in Detroit and giving it to named individuals (A. 114–115).

again appeared before the grand jury, some twenty-four to forty witnesses testified (A. 82, 150).

On August 21, 1969, petitioner appeared before the grand jury three times. On the first occasion, at 9:40 a.m., he refused to answer any questions, again asserting his privilege against self-incrimination (A. 24–30). Thereupon, petitioner appeared before the district judge and was granted transactional immunity under 18 U.S.C. 2514 and ordered to answer the questions which he had refused to answer (A. 86–89). Following the grant of immunity, petitioner made a second appearance before the grand jury. It soon became apparent that petitioner's responses were deliberately evasive (A. 31–37).[4] Petitioner was brought before the court again at approximately 11:45 a.m. After listening to petitioner's grand jury testimony and determining that his answers were "extremely evasive" (A. 97), the district judge adjudged him in contempt of court and directed that he be confined "so long as he refused to answer the questions put to him." Upon petitioner's request that he be given the opportunity that afternoon to purge himself of contempt, the court allowed him to spend a ninety minute lunch break with his attorneys prior to his third appearance before the grand jury, at 2:00 p.m. (A. 97–100). During this interval, petitioner appeared in a television interview and said: "Well, I will answer their questions in such a manner that I won't be contemptuous and I will make sure that what I said—what I say—is exactly

[4] At trial, petitioner admitted he deliberately gave evasive answers (A. 241).

what happened. * * * I do know exactly what happened. So that's what I'm going to do" (A. 273).

In his third grand jury appearance, petitioner testified that Mayor Cavanaugh, Purchasing Agent Stone, and named IRS employees received money in amounts of $500–$3,000 from him or in his presence at a Christmas party given by him in 1967. He also testified that Police Inspector Dunleavy and named IRS employees attended a boxing match at Cleveland, Ohio, in the spring of 1964, and on that occasion, in petitioner's presence, they received money from named individuals at the Sahara Motel, Cleveland (A. 39–67).[5]

Between August 21 and August 26, when petitioner was indicted, six or seven witnesses, including persons accused of taking bribes, appeared before the grand jury (A. 69).

Evidence at trial established that none of the alleged bribe takers had attended the prize fight in 1964 or the Christmas party in 1967. Petitioner, who prior to completion of his grand jury testimony had in no

[5] Following his third grand jury appearance, petitioner appeared at 4 p.m. before Judge Thornton, who adjourned the matter until August 25th, so that he might study the transcript and decide whether petitioner had purged himself of contempt. On August 25th Judge Thornton, a "[f]rom a careful analysis of the transcript," found that (1) the subject matter covered by the questions and answers was within the scope of the investigation being conducted by the grand jury; (2) the questions of the prosecutor were unambiguous; (3) although a part of petitioner's testimony was wilfully evasive, some of petitioner's responses were direct answers to questions. On this basis, Judge Thornton concluded that petitioner had purged himself of contempt (A. 101–102).

way indicated that any of his bribery accusations were false (A. 121, 176, 211–212), contended at trial that he had been entrapped and coerced by government agents to commit perjury (A. 244).*

ARGUMENT

1. The central thrust of petitioner's argument is that the grand jury investigation was staged and manipulated by government agents in order to force him to commit perjury against his will. This claim both mistakes the nature of the grand jury inquiry and distorts the facts of record.

(a) In *Branzburg* v. *Hayes,* 408 U.S. 665, this Court recently restated the role and function of the grand jury. It pointed out that the grand jury "has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Id.* at 686–687. In carrying out this role, the grand jury has extensive powers to investigate. As observed in *Branzburg* (*id.* at 688):

> Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and

* Trial counsel conceded early in the trial that petitioner's accusations were false and that he would so testify when he took the stand (Tr. 262, 265). Petitioner did testify that his grand jury allegations were lies and that he had no knowledge that any of the accused, except Cavanaugh and one IRS agent, had taken bribes (A. 245–248). In his petition for a writ of certiorari, petitioner concedes that he perjured himself before the grand jury (Pet. 13).

> inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." * * * Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that "the public * * * has a right to every man's evidence" except for those persons protected by a constitutional, common-law, or statutory privilege * * * is particularly applicable to grand jury proceedings. [Citations omitted.]

See also *United States* v. *Dionisio,* 410 U.S. 1; *United States* v. *Mara,* 410 U.S. 19; *United States* v. *Stone,* 429 F. 2d 138 (C.A. 2); *United States* v. *Winter,* 348 F. 2d 204, 208 (C.A. 2), certiorari denied, 382 U.S. 995; *United States* v. *Calandra,* No. 72–734, decided January 8, 1974.

The grand jury here was clearly entitled to petitioner's evidence. He was the person who had triggered the investigation with accusations of the commission of crimes, an area where the common law has long recognized the duty of a citizen to furnish information. *Branzburg, supra,* 408 U.S. at 691. The grand jury's investigation would not have been fully carried out if he and all other witnesses had not been examined to find out if the bribery crimes had been committed. *Id.* at 701–702. In the instant case, petitioner claimed to have first hand knowledge of the commission of crimes and had publicly accused federal and local officials of bribery. The government therefore was clearly correct in convening a grand jury to in-

530-235—74——2

vestigate whether the elected and appointed officials named by petitioner were in fact corrupt. The grand jury had a duty to investigate thoroughly the truth or falsity of petitioner's statements to federal investigators. See *United States* v. *Stone, supra,* 429 F. 2d at 140. The investigation team had corroborated some of petitioner's statements. Moreover, five grand jury witnesses had also substantiated some aspects of his allegations. If the jurors had terminated their investigation before he testified and before they had determined the truth or falsity of his bribery charges, they would have prematurely relinquished their proper investigatory function. See *United States* v. *George,* 444 F. 2d 310 (C.A. 6). Moreover, the failure to call petitioner as a witness after his public accusations of bribery of public officials would have created the appearance of impropriety. See *United States* v. *Sweig,* 441 F. 2d 114, 121 (C.A. 2), certiorari denied, 403 U.S. 932.

In short, there is no reason in the setting of this case why the grand jury should not have required petitioner's testimony.

(b) Petitioner also incorrectly alleges that the grand jury was simply the improper tool of a prosecutorial effort to convict petitioner of perjury. It is claimed in this regard (Pet. 12–29) that the grand jury investigation of petitioner's bribery accusations had terminated prior to his perjurious testimony on August 21, 1969. But seven witnesses, including alleged bribe takers Cavanaugh and Getto, testified after August 21, 1969. At this time, the IRS team of investi-

gators was still checking petitioner's accusations and was still supplying the prosecutors with names of persons who had information regarding his accusations. The accused IRS officials were still suspended. The grand jurors had simply not decided, prior to petitioner's testimony, whether the accused officials had accepted bribes.

Petitioner nevertheless argues that because prosecutor O'Leary concluded, prior to August 21, 1969, that petitioner's accusations were unfounded, the grand jury investigation, could not be considered bona fide as of August 21. But if the grand jurors, who as yet were unconvinced the alleged bribe takers were innocent (A. 74, 77), had ceased their investigation simply because an individual prosecutor had become personally convinced of their innocence, the jurors would have abdicated their function of examining every available clue and every witness. *Branzburg, supra,* 408 U.S. at 701. Whatever the reason for O'Leary's belief, the jurors had not made up their minds prior to petitioner's testimony.[7]

The cases upon which petitioner relies, *United States* v. *Icardi,* 140 F. Supp. 383 (D.D.C.), and *United States* v. *Cross,* 170 F. Supp. 303 (D.D.C.), are not in point, since they were prosecutions for

[7] There is accordingly no merit to petitioner's repeated contention (Pet. 12, 27) that the prosecutor misrepresented the situation to the court when petitioner was granted immunity and then placed in contempt. Whatever the personal views of the prosecutor, he had the duty to assure that the investigative function of the grand jury was not blunted; his actions merely carried out this purpose.

perjury committed before a legislative committee.[8] As this Court has stated in considering another grand jury inquiry (*Branzburg, supra,* 408 U.S. at 699–700):

> We do not deal, however, with a governmental institution that has abused its proper function, as a legislative committee does when it "expose[s] for the sake of exposure."

Brown v. *United States,* 245 F. 2d 549 (C.A. 8), is also readily distinguishable. In *Brown,* a Nebraska grand jury had the defendant brought without a subpoena from Pennsylvania to Nebraska, where he was questioned before the grand jury about events occurring some four years previously in Missouri. *Id.* at 551, 553. He was subsequently indicted and found guilty on four counts of perjury. The court of appeals held that (*id* at 554) where the evidence established beyond all reasonable doubt that a Nebraska grand

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[8] In both cases, the appearance of the defendant had not been arranged for any legitimate congressional investigation. When Icardi testified, the committee was not functioning as a competent tribunal (140 F. Supp. at 388) and, even assuming it was so functioning, Icardi's false answers did not relate to a "material matter," the test of which is "whether the false testimony was capable of influencing the tribunal on the issue before it." *Ibid.* In *Cross,* the defendant, in his initial testimony before a Senate committee, had denied he was present during the assault of a union member. Later, the committee recalled Cross for the purpose of emphasizing the untruthfulness of his prior denial. Subsequently Cross was indicted for committing perjury during his second appearance before the committee. The court held that the perjury indictment was founded on testimony in response to questions which were not asked for the purpose of eliciting facts material to the committee's investigation (170 F. Supp. at 310). In the instant case, peti-

jury caused defendant to be brought before it for the sole purpose of extracting testimony upon which defendant could be prosecuted for perjury and "without any purpose of obtaining from him any evidence upon which, in whole or in part, it could find a true bill against anyone for any offense committed in whole or in part in Nebraska," such grand jury was acting beyond its powers, and answers of defendant, even if false, could not be made the basis of a prosecution.

Here, by contrast, there was a bona fide investigation, and the grand jury in Detroit was acting within its powers and within its jurisdiction. It was considering bribery transactions involving Michigan residents and occurring, for the most part, within Michigan. It could therefore have properly returned bribery indictments against these officials. Nor was its inquiry limited by the fact that the prosecutor, disagreeing with the grand jury foreman and the IRS investigator, expected that petitioner's testimony would produce no evidence upon which to indict the alleged bribe takers.

(c) Petitioner also contends (Pet. 29–46) that he did not wilfully commit perjury since, according to his claim, he was illegally coerced and entrapped by the government into testifying falsely before the grand jury. The record belies this claim.

When the district judge granted petitioner immunity, he compelled petitioner to testify under pen-

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tioner, unlike Icardi and Cross, was summoned to testify during an ongoing grand jury investigation of his bribery accusations. And, unlike Cross, he had not in a prior appearance denied or affirmed the bribery transactions; rather, he had evaded giving direct answers and thereby had in effect refused to testify.

alty of contempt. But such "coercion" under a grant of immunity has been specifically authorized by 18 U.S.C. 2514 and 6001 for grand jury investigations of bribery of public officials. Here the grand jury was still investigating petitioner's bribery accusations when he was granted immunity on August 21, 1969. Clearly, petitioner's testimony was "material" to the investigation of charges originally made by him. Moreover, by virtue of 18 U.S.C. 2514, the district court properly adjudged petitioner in contempt when he gave deliberately evasive answers during his secon appearance before the grand jury on August 21.

Petitioner asserts that, in his second appearance before the grand jury, he had answered the questions put to him, but that he was nevertheless held in contempt and compelled to give the perjurious testimony desired by the judge and the prosecutor (Pet. 33–37). The judge in the contempt hearing found as a fact that petitioner had not answered the questions put to him; instead, he gave evasive testimony, which is equivalent to a direct refusal to testify (A. 97–98; see *Richardson* v. *United States,* 273 F. 2d 144, 147–148 (C.A. 8), and cases there cited). Indeed, petitioner testified at trial that he had deliberately given evasive answers, because "I didn't want to lie" (A. 241). The other possibility, of course, was to give direct truthful answers. Petitioner's current assertion that he had in fact truthfully testified in his second grand jury appearance that he did not know whether the bribes had been given is also belied by his public statement between his second and third appearance before the

grand jury that "I do know exactly what happened" (A. 273).

Petitioner errs in contending that the prosecutor and the judge compelled petitioner to repeat under oath his prior statements to IRS officials. Neither in granting immunity nor in ordering petitioner held in contempt did the judge intimate in any way what the content of petitioner's testimony should be.

Rather, in granting immunity, the district judge directed petitioner "to answer the questions which you have heretofore refused to answer, on the grounds of possible self-incrimination" (A. 88); and, in adjudging petitioner in civil contempt, the judge committed petitioner to the United States Marshal "for such time as you * * * refuse to answer the questions put to you by the Government, before the Grand Jury, under the protection of the immunity previously granted to you by this Court" (A. 98). Once petitioner gave direct truthful answers he would have purged himself of contempt and would no longer have been subject to imprisonment for civil contempt or prosecution for perjury.

Neither the prosecution nor the IRS investigators ever importuned petitioner to testify falsely. They, like the Michigan State Police and petitioner's attorneys, simply advised him to testify truthfully (A. 144, 166, 203). Contrary to petitioner's contention (Pet. 32), they never advised him that he should repeat his accusations under oath. There was no entrapment.

As noted by petitioner (Pet. 45), entrapment occurs when law enforcement authorities cause to be committed a crime which would not have occurred but for their machinations. *Sherman* v. *United States*, 356 U.S. 369, 372. Here, DeBoer's only "machination" was investigation of petitioner's accusations, and O'Leary's only "machination" was calling petitioner to testify before a grand jury which was considering the truth or falsity of his accusations.[10]

2. Petitioner argues, but does not present as a question for review, that the district court improperly imposed a separate and cumulative sentence on each count of the indictment. This contention is likewise without merit.

The indictment charged that petitioner falsely testified that six officials (four IRS agents and two Detroit officials) separately received bribes from petitioner at a Christmas party in 1967. The indictment also charged that petitioner falsely testified that one of these IRS agents, another IRS agent and another

[10] Nor, contrary to petitioner's contention (Br. 42), did prosecutor O'Leary "literally bludgeon" him into committing perjury. Rather, he arranged to give immunity to petitioner, thus preventing any federal prosecution of petitioner for making false statements to the Internal Revenue agents in violation of 18 U.S.C. 1001. After petitioner's deliberately evasive testimony during his second appearance, O'Leary did attempt to elicit direct answers from petitioner. But eliciting direct answers from a recalcitrant witness, who over a period of five months had clearly described the details of his alleged bribery transactions and who three weeks previously had testified at a state trial that Joseph Barbara had bribed IRS agents and Mayor Cavanaugh at his 1967 Christmas party (A. 90–91), is not in any sense "bludgeoning" a witness.

Detroit official had received bribes in petitioner's presence following their attendance at a boxing match in 1964. Petitioner's claim that this is a single lie broken down into twelve counts is inaccurate. Rather, the testimony concerning each separate payment, six bribes at the Christmas party and three following the fight, constituted nine lies, each wholly distinct from the others, which properly may be subject to separate punishment. See *Gebhard* v. *United States*, 422 F. 2d 281, 289 (C.A. 9). See, also, *United States* v. *Tyrone*, 451 F. 2d 16, 18 (C.A. 9); *Richards* v. *United States*, 408 F. 2d 884 (C.A. 5), certiorari denied, 395 U.S. 986.

When petitioner in his testimony separately accused seven officials of receiving bribes on one of two occasions, and accused an eighth official of receiving bribes on both occasions, his false testimony constituted multiple crimes—wrongs against each of these officials and wrongs against the grand jury. If the grand jury had believed petitioner's testimony, each of these officials might have faced a bribery indictment. In these circumstances, under a reasonable construction of the perjury statute and with due regard to the evils it is directed to prevent, this testimony constituted, as in *Gebhard*, separate lies—nine in number—which were properly prosecuted and punished under separate counts.[11]

[11] The government conceded that three of the counts were repetitive; the court below vacated the sentences on those counts (Pet. App. 10a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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January 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974